



La Marina Limited v Kambiti & 2 others (Environment & Land Case 31 of 2011) [2023] KEELC 17084 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 31 OF 2011**

MAO ODENY, J

MAY 3, 2023

BETWEEN

LA MARINA LIMITED PLAINTIFF

AND

GIDEON MAINA MURIUKI 1ST DEFENDANT

RIZIKI CHARO KAMBITI 2ND DEFENDANT

SHADRACK NDUNDI 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated April 13, 2011 the Plaintiff herein sued the defendants seeking the following orders;
 - a. A declaration that the Title Deed and/or Lease for Plot Title Number Chembe/ Kibabamshe/ 398 is illegal, null and void.
 - b. A declaration that the Title Deed for Plot Chembe/kibabamshe/641 is valid.
 - c. A declaration that the Plaintiff is the indefeasible and absolute proprietor of Plot Title Chembe/ Kibabamshe/641.
 - d. A permanent injunction restraining the defendants by themselves, their servants and/or agents from selling, transferring, assigning and/or any manner whatsoever dealing or interfering with Plot Titles Chembe/ Kibabamshe/ 641 And Chembe/ Kibabamshe/ 398.
 - e. Costs of the suit.



Plaintiff's Case

2. Pw1 Philip Munge Ndolo the director of the Plaintiff Company adopted his witness statement dated April 13, 2011, a bundle of documents dated September 12, 2013 and a supplementary bundle of documents dated October 13, 2013.
3. It was PW1's evidence that sometimes in 1998 the plaintiff identified some land for acquisition in Chembe/Kibabamshe in Kilifi District which land was government Land. PW1 stated that he then applied to be allocated the land and the same was allocated to him.
4. PW1 stated that that he did due diligence and found that the parcel of land known as Chembe/Kibabamshe/398 originally registered as a government land under the Settlement Fund Trustee existed. That the land was subdivided between the years 1998 and 2001 into several plots namely Plot Nos Chembe/Kibabamshe/ 652, 655,638, 646, 641,635 and 665 respectively.
5. It was PW1's clarified that a letter of offer given to Mr Philip Ndoro was a misspelling where his surname name was captured as Ndoro instead of Ndolo. That he had an outright purchase at a valuation of Kshs 10,430/ and assessment of other government levies all totaling to Kshs 15,248/- and produced a letter confirming that all payments to the Settlement Fund Trustee was fully settled by PW1 after which a certificate of outright purchase was issued dated July 30, 1999.
6. PW1 produced a resolution by the Directors, a letter dated July 28, 1999, Gazette Notice dated May 31, 1986, letter dated July 31, 1986, a letter dated December 1, 2000, letter dated May 17, 2000, Mutation Forms of the suit parcels, a receipt for Kshs 15,248, Certificate of purchase for Plot No 641, official for purchase, application for LCB consent, a consent letter, transfer document, official title for the suit land, and a certified true copy of original green card for Plot No 641.
7. It was PW1's testimony that the title claimed in the counterclaim did not exist as they were cancelled in 1986 through a gazette Notice No 2505 dated May 31, 1986.
8. Upon cross examination by Mr Kokebe, PW1 told the court that the subdivision was for Plot No 398 and that it was true that Plot Nos 398 title ceased to exist *vide* a gazette notice. He also told the court that he lay claim to plot No 641 and upon being shown certificate of lease dated January 28, 2011 he stated that the acreage was 4Ha and that his claim was for 2 Hectares in Plot No 641. According to PW1, parcel 639's acreage was about 0.5 Ha, 724 measuring about 0.5 Ha, 640 0.5Ha and parcel 641 measured 2.6Ha.

Defence Case

9. DW1 Samuel Njuguna Kariuki an Advocate of the High Court of Kenya adopted his witness statement dated September 20, 2020 and stated that the 2nd Defendant approached the firm of Sichangi Partners & Associates LLP to undertake a transaction on his behalf after coming to an understanding with the registered proprietor of Chembe/ Kibabamshe/ 398. That the firm proceeded to carry out an official search which search disclosed that the vendor was the owner of the suit property and that there was no encumbrance on the title.
10. DW1 also testified that in compliance with the agreement of the parties after the full purchase price was paid by the purchaser, the vendor who is the 1st Defendant released the completion documents and having received all the necessary completion documents on behalf of the 2nd Defendant, the firm proceeded to lodge the duly executed transfer forms at the Kilifi District Land's Registry to effect the change of ownership.



11. It was DW1's evidence that the 2nd Defendant facilitated the payment of stamp duty and registration fees necessary to effect the transfer in his name. That subsequently a title was issued in respect of Chembe/ Kibabamshe/398 to the 2nd Defendant.
12. On cross examination by Mr Mkomba, he stated that he could not confirm that the title was government land and on being shown page 1 of the Plaintiff's further supplementary list of documents, he told the court that the title appears as a subdivision of Plot No 398 which was issued on April 17, 2001 and that they were not aware of any subdivision of the original plot No 398. He admitted having never seen the allotment letter from the 1st Defendant as they were already with the title.
13. DW1 further told the court that the 1st Defendant's title does not have the Registry Mark sheet No and that the 1st entry was made on 28th January as per the green card. He also admitted that according to D Exhibit No 5 the title in the name of Gideon Maina Muriuki was issued on January 14, 2011 and another title in the name of the same 2nd Defendant issued on July 9, 2013.
14. It was DW1's evidence that there was a cancellation of one title based on the letter dated July 17, 2013 for the rectification of the register to be issued with fresh transfer documents. Further that the title is dated July 9, 2013 which is the current title has a RIM No and the 1st allottee as Riziki Charo Kambiti entry is in favour of the 2nd Defendant. According to him, the cancellation should appear on the green card.
15. On reexamination by Mr Kokebe, he stated that there was a letter from the Land Registrar inquiring about the lessee of the property and fresh transfer forms so that they could regularize the register. DW1 stated that the title that was issued in 2013 indicates the RIM was registered in the name of Gideon Maina Muriuki and the search indicated that the 2nd defendant was the registered owner according to the post registration search.

Plaintiff's Submissions

16. Counsel submitted that the burden of demonstrating how the lease was issued was on the 1st defendant which he submitted that the same was not discharged by the 1st defendant.
17. Counsel further submitted that the 1st defendant filed a witness statement dated 15th January /2014 but did not attend court to hence the statement serves no purpose and relied on the case of *Kenneth Nyaga Mwiye v Austin Kiguta & 2 others* [2015] eKLR.
18. Mr Mkomba submitted that the 1st & 2nd Defendants' Defence & Counterclaim dated May 12, 2011 had an accompanying written Authority which was never produced and that DW1 equally failed to produce any authority to testify on behalf of the 2nd Defendant. Counsel therefore submitted that the Counterclaim was not proven on a balance of probabilities.
19. Counsel submitted that from the evidence, what ought to be scrutinized is the root of the title of Plot No Chembe/ Kibabamshe/398 of which he stated that the title does not exist having been subdivided way back in 2001 and new title deeds issued by the government.
20. It was counsel's further submission that the Plaintiff having produced the Gazette Notice of 1986 and the letter by Mr Njenga on the validity of the original title deed, the burden shifted to the 1st defendant to show how he was able to process a title deed over parcel No Chembe/ Kibabamshe/398 after 25 years.
21. According to counsel, the 1st Defendant had a duty to reply to the issue of the root of the title but he did not and urged the court to consider which title is valid between the title deed which was cancelled



after the Gazette Notice in 1986 and the title deed held by the 2nd Defendant. He submitted that from the evidence by the 1st Defendant, they have not demonstrated the process of issue of that title by the government and that the 1st Defendant had a responsibility to lay foundation of how he acquired a certificate of lease in 2011.

22. Counsel identified d two issues for determination namely the legality and fraud in acquisition of title to plot No Chembe/ Kibabamshe/ 398 and whether the 2nd Defendant can qualify to be a purchaser for value without notice.
23. On the 1st issue, counsel submitted that the Plaintiff had pleaded at paragraph 10C that the defendants had committed fraud and illegalities as set out in the particulars of fraud. It was his submission that the Plaintiff had tendered evidence to prove those allegations as prior to 1998, Plot No Chembe/ Kibabamshe/398 was subdivided into several sub divisions as shown in the mutation form.
24. Counsel further submitted that the official Government position, the original Plot No Chembe/ Kibabamshe/398 was subdivided and as at 2003 it did not exist and relied on the case of *Nancy Kaboya Amadiva v Expert Credit Limited & another* (2015) eKLR and *Sarah Jelangat Siele v Attorney General & 3 others* (2018) eKLR.
25. On the 2nd issue as to whether the 2nd Defendant was a purchaser for value without notice, counsel relied on the case of *Central Kenya Ltd v Trust Bank Limited & 4 others* (1996) eKLR and submitted that a purchaser for value without notice must purchase a valid title.
26. Counsel urged the court to find that the plaintiff has proved his case and that the defence and counterclaim should be dismissed with costs.

2nd Defendant's Submissions

27. Counsel for the 2nd defendants identified four issues for determination as follows
 - a. The validity of title to all that parcel of land known as Chembe/ Kibabamshe/398?
 - b. Has there ever been any subdivision on the said parcel of land and was due process followed?
 - c. Is the 2nd Defendant a bona fide purchaser for Value?
 - d. What are the remedies available?
28. On the first issue whether the 2nd Defendant's title is valid, counsel he relied on Section 27 of the *Registered Land Act* Cap 300 (now repealed) which provided that the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto and further relied on the case of *Divyesh Kotecha Ramesh v Attorney General & 3 Others* (2018) eKLR.
29. It was Mr Kokebe's submissions that the 1st Defendant passed good title to the 2nd Defendant who upon purchase and subsequent transfer and registration of the title in his name became the registered proprietor thereof.
30. Counsel further relied on the case of *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* (2017) eKLR where the court cited the decision in *Chemei Investments Limited v Attorney General & others* Nairobi Petition No 94 of 2005 on indefeasibility of title.



31. On whether there has been division on the suit property, counsel submitted that the existence of plot No Chembe/ Kibabamshe/398 has been acknowledged all through save for the alleged subdivision leading to the creation of plots Chembe/ Kibabamshe/ 635, 638, 641, 646, 652, 655 and 665 to which the Plaintiff only laid claim on plot Chembe/ Kibabamshe/641 to which he submitted that does not exist. Counsel submitted that the process leading to the purported subdivision was unprocedural.
32. Mr Kokebe also submitted that the creation of the said titles was disowned in affidavit evidence by one Mary Kai Ndale who is alleged to have been the Registrar who executed and registered the rival titles allegedly curved of the mother titles through a process of mutation.
33. Counsel further relied on the ruling by Hon. Justice Angote dated February 7, 2013 where the court was of the opinion that the veracity of one Mary Kai could only be tested at trial and the Plaintiff having this information, opted not to call her as a witness.
34. Counsel submitted that there has never been any sub division of all that property known as Chembe/ Kibabamshe/ 398 and relied on the case of *Jackson Kituku Musikali & 8 others v Penina Mueni Kaipon & another* (2016) eKLR where the court held that failure to register a mutation, extinguished the rights of an applicant.
35. Counsel urged the court to find that the unprocedural dealing and failure to comply with the formal requirements or mistake of not signing or registering the mutation form to date makes the entire transaction unenforceable.
36. It was Mr Kokebe's submission that PW1 Mr Phillip Ndolo admitted that during the process or upon acquisition of the said parcels of land created by the rival titles, the state preferred charges against him and others for fraud that led to the creation of the said rival titles. That the State only proffered a nolle prosequi which in itself did not cleanse the vendors thereof of any wrong doing and is not a bar to reinstatement of the said cases which he used to file this case against the 2nd defendant.
37. On whether the 2nd Defendant is a bonafide purchaser for value, counsel relied on the case of *Lawrence Mukiri v Attorney General & 4 others* (2013) eKLR and submitted that the 2nd Defendant has led evidence on how he acquired all that parcel of land known as Chembe/ Kibabamshe/ 398 and that he paid valuable consideration. He further relied on Section 24,25 and 26 of the *Land Registration Act* and urged the court to dismiss the plaintiff's case and allow the counterclaim with costs.

Analysis And Determination.

38. The issues for determination are as follows;
 - a. Whether there was subdivision of parcel known as Chembe/ Kibabamshe 398.
 - b. Which title deed is valid between the one held by the Plaintiff and that held by the 2nd Defendant;
 - c. Whether the Plaintiff is entitled to the prayers sought in the Plaint; and
 - d. Whether the 2nd Defendant is entitled to the prayers sought in the Counter Claim.
39. This is a case where the plaintiff claims to be owner of Plot Title Number Chembe/ Kibabamshe/ 641, and the 2nd Defendant on the other hand claims to own Plot Title Number Chembe/ Kibabamshe/ 398 which seems to be one and the same plot from the evidence on record.



40. The Plaintiff claims that plot No Chembe/ Kibabamshe/ 641, was a creation of a subdivision of plot No Chembe/ Kibabamshe/ 398 which subdivision bore other plots namely 652, 655, 638, 646, 635 and 665.
41. It was the plaintiff's case that title No 398 claimed by the 2nd defendant does not exist as it was cancelled in 1986 through a gazette Notice No 2505 dated May 31, 1986. The plaintiff however admitted that the Mutation form that created Chembe/ Kibabamshe/ 641 was never signed at the Lands Registrar further that the acreage that he is claiming is 2 hectares while Plot No 398 is 4 hectares.
42. It is important to note that the Ruling by Hon. Justice Angote dated February 7, 2013 where the Judge referred to the sworn affidavit of Mary Kai the then Land Registrar Kilifi who stated that she did not sign the alleged titles including plot No 641 claimed by the plaintiff. The court noted thus:

“It may be true, as deponed by the 1st Respondent that the purported sub-division of plot 398 as alleged by the applicant never happened and consequently the existence of plot number 641 which is said to have been curved from plot 398 does not arise. Indeed, it will be upon the applicant at the trial of the suit to show how that sub-division of plot number 398 was commenced and whether all prerequisite steps were followed in the creation of plot number 641. It will be upon the applicant to call the maker of the Title Deed for plot 641 with a view of rebutting the 1st Respondent's evidence that the Registered Index Map has never been amended to show that plot number 398 was sub-divided to create plot number 641 and that the Mutation forms were not signed and registered upon sub-division of plot number 398. This evidence can only be produced at the trial and subjected to cross examination.”

43. The plaintiff stated that he was not aware of the ruling and when asked whether he was calling any other witness, he stated that he was the only witness. This evidence was not challenged, hence it remains valid evidence in this case on the issue of subdivision and creation of titles from plot No 398.
44. I have had a look at the mutation form that purportedly subdivided Plot No Chembe/ Kibabamshe/ 398 but found that the same was neither signed nor registered by the Land Registrar as required by law. There is a letter dated December 1, 2000 by the District Surveyor Malindi to the Director Land Adjudication and Settlement forwarding Mutation forms for endorsement of plot Nos Chembe Kibabamshe 381,393,424, 391, 398, 396, and 375. There was no evidence that the same were signed especially 393 and 398.
45. In the case of *Jackson Kituku Musikali & 8 others v Penina Mueni Kaipon & another* [2016] eKLR, it was held that failure to register a mutation, extinguished the rights of an applicant.
46. This court rendered a judgment in respect of plot No 393 in the case of *Soft White Beach Limited v Joseph Kasburu Mumbo & 4 others* [2013] eKLR where Olola J held that:

“As it turned out however, PW1's testimony did not satisfactorily explain how Parcel No 393 ceased to exist and how the sub-division Parcel Nos 651 and 652 came into being. During his cross-examination, PW1 conceded that before the issuance of a title deed, the mutation has to be registered. As it turned out, the Mutation creating Parcel Nos 651 and 652 was never registered as required.”

47. The court further stated that

“I have taken a keen look at the Mutation Forms which allegedly created the sub-division of Parcel No 393. The same were neither signed by the



Land Registrar nor, as conceded by PW1, registered. The Registered Index Map (RIM) was equally never amended to reflect the sub-division. On being cross-examined on this confused and irregular state of affairs, PW1 who issued the titles for Parcels Nos 651 and 652 in the name of the

Plaintiff testified as follows: -

“The owner must sign the mutation form. According to your document, the mutation is not signed by the owner but it is signed by the

surveyor. The mutation form is not dated. It is not signed and registered by the District Surveyor. Once it is registered, it was supposed to be sent to the Surveyor for amendment of the RIM. The effect of non-registration is that no title can issue.”

48. The above is the exact situation that happened with plot No Chembe/ Kibabamshe/ 398 where the mutation was neither signed by the owner, the Land Registrar, dated nor registered as required by law. The net effect of an unsigned and unregistered mutation by the land Registrar is that no title can be issued and if there were any titles issued vide such a mutation then they were illegal and null and void.
49. The alleged subdivision was never reflected in the Registry Index Map(RIM) as it was unprocedural. The 2nd Defendant stated that there was no subdivision since Registry Map Sheet No 29 shows that there was no such subdivision.
50. A letter dated February 8, 2019 by the National Land Commission to the Acting Chief Land Registrar titled, “Determination of review of grants in respect of Plot No Chembe /Kibabamshe/398 Kilifi County”The Chair of the National Land Commission stated as follows:

“During public hearings held at Malindi Red Cross Hall Malindi, all interested parties in the Settlement Scheme were invited to make their oral and written submissions before the Commission, Rombo Advocate for Robert, Phillip Ainsworth, Philip Ndolo for Lamarina and Riziki Charo Kambiti among others.

Having received oral and written submissions from all the parties the Commission came to the following findings:

As per records held at the Office of the Registrar Kilifi, the property Chembe/ Kibabamshe/398 was allocated by way of adjudication to Mathenge Wachira in 1978

It was re-allocated to Riziki Charo Kambiti having noted that the first adjudicated person was not a local of the area.The allottee then sold the property for consideration to Gedion Maina Muriuki.

The property owners surrendered the freehold title to the Government. A lease Certificate was issued to the same owners for a term of 99 years. The Commission also noted of the ongoing court case at Malindi High Court Case No 31 of 2011 by Lmarina lts which was later dismissed.

In view of the foregoing the Commission therefore determines that the property legally belongs to Gideon Maina Muriuki . The subsequent title issued to Lamarina Limited is illegal/unlawful and the Chief Land Registrar is hereby directed to revoke the same.”

51. From the evidence adduced by the parties it is clear that no subdivision took place and if it did then the process was either flawed or a nullity hence could not have yielded the titles that were purportedly curved out of plot No 398. If the sub division ever took place, then the mutation forms should have



been signed by the District Land Registrar and registered accordingly and the same sent to the Director of Survey to amend the Registry Index Map sheet as required by the law which in this case did not happen.

52. I have considered the pleadings, the evidence on record, the submissions by counsel and the relevant authorities and find that the plaintiff has not proved his claim to the required standard hence the same is dismissed with costs to the defendants. Having found that there was no subdivision of Plot No Chembe/ Kibabamshe/ 398 it follows that the same is the valid title of the suit land which belongs to the 2nd defendant hence entitled to the same as an indefeasible owner.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3rd DAY OF MAY, 2023.

M.A. ODENY

JUDGE

